

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1463

Cir. Ct. No. 1999CF5150

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISIMBA L. LOVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lisimba Love appeals a circuit court order denying his postconviction motion. Love was convicted of armed robbery and is seeking a new trial on the ground that he has newly discovered evidence that someone else committed the robbery. The circuit court denied his motion, and we affirm.

BACKGROUND

¶2 In 2000, Love was convicted of armed robbery and sentenced to forty-four years in prison. Since that time, Love has filed several post-conviction motions arguing that his cousin Floyd Lindell Smith committed the robbery. Three of these motions resulted in evidentiary hearings. Each time, the circuit court denied Love's request for a new trial, finding that the witnesses were not credible. At the third evidentiary hearing, Smith himself testified that he committed the robbery. The circuit court found that Smith was not credible and that he had motive to fabricate because the statute of limitations on the robbery had expired. Accordingly, the court denied the motion for a new trial on the ground that Love had not shown a reasonable probability of a different outcome.

¶3 Love's current postconviction motion relies on the affidavit of Anita Aydin, who states that Smith came to her house on the night of the robbery with her nephew, James Jackson. According to the affidavit, Jackson told Aydin that the two of them had just committed the robbery and showed her some of the items taken. Love argued that this affidavit is newly discovered evidence that creates a reasonable probability of a different result at trial.

¶4 The circuit court denied Love's motion without an evidentiary hearing. The court explained that several other witnesses had come forward to blame Smith for the robbery, but none of them were credible. It rejected Love's

argument that the court should reevaluate these credibility determinations now that Aydin had come forward with corroborating evidence. In particular, it determined that Aydin's affidavit was inadmissible hearsay and that the testimony of a witness who had no direct knowledge of the crime could not create a reasonable probability of a different outcome at trial.

DISCUSSION

¶5 Love argues that the circuit court erroneously exercised its discretion in denying his motion for a new trial. He contends that Aydin's affidavit satisfies the standard for granting a new trial. *See State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). He further contends that the circuit court erred when it decided to stand by its previous determinations that Love's witnesses were not credible. Instead, Love argues that the court should have reconsidered the prior testimony alongside Aydin's corroborating testimony. He argues that, when taken together, the testimony of all of the witnesses who have come forward to implicate Smith creates a reasonable probability of a different outcome at trial. *See id.*

¶6 The problem with Love's argument is that the circuit court determined that his new evidence was hearsay that would not be admissible at trial. Assuming the circuit court was correct, Love's argument that there is a reasonable probability of a different result at trial falls flat.

¶7 In his opening brief, Love did not challenge the court's determination that his newly discovered evidence is inadmissible hearsay. In his reply brief, Love concedes that Aydin's testimony would be hearsay, but argues that the court may admit hearsay when there is adequate assurance of its

trustworthiness. *See id.* at 255. Love has not demonstrated that the exception articulated in *Bembenek* applies here.

¶8 In *Bembenek*, a defendant argued that the court should have ordered a new trial after three witnesses submitted affidavits stating that another inmate had confessed the crime to them. *Id.* at 253. However, the inmate refused to testify. *Id.* We explained that the hearsay rule should not be applied “mechanistically” if the proffered testimony is critical to the defense and bears persuasive assurances of trustworthiness. *Id.* at 255 (quoting *State v. Sharlow*, 110 Wis. 2d 226, 233, 327 N.W.2d 692 (1983)). Instead, a circuit court may exercise its discretion to consider a hearsay confession if four factors are present that provide adequate assurance of trustworthiness. *Id.* at 255. These factors are: “(1) the confession was made spontaneously to a close acquaintance shortly after the crime; (2) it is corroborated by other evidence; (3) it ‘was in a very real sense self-incriminatory and unquestionably against interest’; and (4) the declarant is available to testify.” *Id.* (quoting *Sharlow*, 110 Wis. 2d at 233-34. We concluded that the circuit court did not erroneously exercise its discretion in determining that the hearsay evidence of the inmate’s confession was not a sufficiently reliable basis for granting a new trial. *Id.* at 256.

¶9 Just as the jailhouse confession in *Bembenek* did not help that defendant, Aydin’s assertion that Jackson confessed to her does not help Love. In particular, the fourth assurance of trustworthiness identified in *Bembenek* is that the declarant is available to testify. *Id.* at 255. Love points to the fact that Aydin is available to testify. However, Aydin is not the relevant declarant for the hearsay that Love thinks will help him at a new trial. Instead, it is Jackson who purportedly made the out-of-court statement that Love would use to prove the truth of the matter asserted, namely that Jackson and Smith committed the

robbery. But Love has no plans to call Jackson as a witness, and the record is otherwise silent as to whether Jackson is available to testify. Therefore, Love cannot establish sufficient indicia of reliability under the four factors identified in *Bembenek*. See *id.* And even if Jackson were available, it would still be within the sound discretion of the circuit court whether to admit Aydin's testimony about his confession. *Id.* Love has not given us a basis for disturbing the circuit court's discretionary decision to reject this evidence as inadmissible hearsay.

CONCLUSION

¶10 Because Love has not presented evidence that would create a reasonable probability of a different result at trial, we affirm the order of the circuit court denying his postconviction motion.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

